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No. 82-401

IN THE

Supreme Court of the United States

October Term, 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

EVA REHNER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE STATE OF MINNESOTA, STATE OF SOUTH DAKOTA, COUNTY OF MAHNOMEN, MINNESOTA AND STATE OF FLORIDA DEPARTMENT OF BUSINESS REGULATION IN SUPPORT OF PETITIONER BAXTER RICE

MARK V. MEIERHENRY
Attorney General
State of South Dakota
ROBERT L. TIMM
Chief Deputy
Attorney General
State Capitol Bldg.
Pierre, South Dakota 57501
Tel: (605) 773-3215
Counsel for
State of South Dakota
HAROLD F. X. PURNELL
General Counsel
Florida Department of
Business Regulation
Division of Alcoholic
Beverages and Tobacco
Tallahassee, Florida 32301
Tel: (904) 488-7865

WARREN SPANNAUS
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Counsel of Record
Special Assistant
Attorney General
Third Floor, Centennial
Bldg.
Saint Paul, MN 55155
Tel: (612) 296-3294
Counsel for
State of Minnesota
DAVID ALBERT MUSTONE
TOM D. TOBIN
TOBIN LAW OFFICES
Suite 1118
1875 Connecticut Ave.,
N.W.
Washington, D. C. 20009
Tel: (202) 467-5712
Counsel for
Mahnomen County

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INTEREST OF AMICI CURIAE

The Amici have a strong interest in the issues presented by this appeal relating to the scope and effect of 28 U.S.C. §1161. There are eleven Indian reservations in Minnesota, at least six reservations in South Dakota, and five reservations in Florida which currently are recognized by the Department of the Interior. Reservation land occupies large amounts of territory in all three states.[1] The County of Mahnomen is located entirely within a recognized Indian reservation. Questions regarding the enforceability of tribal and state liquor laws have already been raised within various reservations in the states, and in some cases citations have been issued for alleged violations of liquor laws. The resolution of this case will obviously have a substantial impact with regard to the regulation of liquor transactions in large areas of the states. The court of appeals' language regarding exclusive tribal jurisdiction is especially troublesome in a state like Minnesota, where on some reservations the non-Indian population is two or three times the Indian population and the majority of land is owned by non-Indians. Therefore, the Amici wish to participate here in order to present their views regarding certain aspects of the substantive issues presented by this appeal.

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[1] For example, in Minnesota reservations encompass approximately 2.5 million acres — about 4.6% of the total area of the state.

SUMMARY OF ARGUMENT

The Amici are writing separately in order to express their concern about the unnecessary and, in their view, incorrect conclusion of the court of appeals that 18 U.S.C. §1161 vests a resident Tribe with "exclusive jurisdiction to license and distribute liquor on the reservation. . . ." 678 F.2d 1340, 1342. The Amici's basic position is that Congress, when it enacted 18 U.S.C. §1161, was solely concerned with eliminating the blanket federal prohibition against liquor sales within Indian country or to "ward" Indians. That prohibition had long been considered discriminatory against Indians. In its stead Congress chose to substitute a so-called local option whereby the federal prohibitions against liquor sales would be applicable only where local laws—both state and tribal—were not followed. *See generally, United States v. Mazurie*, 419 U.S. 544, 547 (1975); Department of the Interior, *Federal Indian Law* at 135, 262 and 382 (GPO 1958). Unlike Public Law 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360), the statutory provision dealing with liquor was not intended as an affirmative grant of jurisdiction to either the states or to the tribes. Neither was the liquor statute intended to deprive the states or tribes of any governmental authority they might otherwise have under applicable law. Indeed, by removing the blanket prohibition against possession and sale of liquor in Indian country, Congress removed the federal government in large part from the field of liquor regulation, and effectively opened the way for the exercise of state and tribal jurisdiction over the subject matter.

ARGUMENT

I. SECTION 1161 WAS INTENDED MERELY TO ELIMINATE THE DISCRIMINATORY TREATMENT OF INDIANS RESULTING FROM THE FEDERAL LIQUOR LAWS.

A. The Legislative History and Surrounding Circumstances.

The provisions of 18 U.S.C. §1161 were enacted into law as part of the Act of August 15, 1953. 67 Stat. 586, §2. As originally introduced, this legislation was designed to apply only to the Indians of Arizona. *See* "A Bill To Terminate Federal Discrimination Against The Indians of Arizona," H.R. 1055, 83d Cong., 1st Sess. (1953). When this bill was reported out of the House Committee on Interior and Insular Affairs, the original enacting clause was stricken and was replaced with substitute language. The substitute language incorporated most aspects of the original bill but made the bill's provisions applicable nationally. *Compare* H.R. 1055, *supra*, as originally introduced with, *e.g.*, H.R. Rep. No. 775, 83d Cong., 1st Sess. at 1 (1953); 99 Cong. Rec. 9959 (1953).

In order to reflect the broader scope of this substitute bill, its title was amended to read "A Bill To Eliminate Certain Discriminatory Legislation Against Indians In The United States." *See, e.g.*, H.R. Rep. No. 775, *supra* at 2; 99 Cong. Rec. 9959 (1953). The new version of H.R. 1055 was subsequently passed by the Senate with minor amendments. *See* S. Rep. No. 722, 83d Cong., 1st Sess. at 1 (1953); 99 Cong. Rec. 10800-02 (1953). After the House concurred in the Senate amendments (99 Cong. Rec. 10928 (1953)), H.R. 1055 was signed into law as Public Law 83-277. As enacted into law,

this legislation effectively repealed the prohibitions against the sale and possession of liquor in Indian country except where such is prohibited by state or tribal law. *See, e.g.*, S. Rep. No. 722, *supra* at 1; Hearings on H.R. 1055 held before House Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs (March 18, 1953), Pet. Br., App. A at 9-21, a-26 - a-27 (Statements of Dillon S. Meyer, Commissioner of Indian Affairs;[2] *Federal Indian Law*, *supra* at 382. *See also United States v. New Mexico*, 590 F.2d 323, 328 (10th Cir. 1978), *cert. denied*, 444 U.S. 832 (1979).

Efforts to change the federal liquor laws had begun several years prior to the Eighty-Third Congress. As early as 1949, bills were introduced in Congress to amend or repeal the long-standing blanket prohibition (18 U.S.C. §§1154, 1156) against liquor sales within Indian country or to "ward" Indians. *See, e.g.*, H.R. 4941, 81st Cong., 1st Sess. (1949). Similar bills—either national in scope or aimed at Indians located in particular states—were introduced in succeeding sessions of Congress. *See, e.g.*, H.R. 6238, 82d Cong., 2d Sess. (1952); H.R. 6703, 82d Cong., 2d Sess. (1952); H.R. 6879, 82d Cong., 2d Sess. (1952); S. 485, 83d Cong., 1st Sess. (1953); S. 1080, 83d Cong., 1st Sess. (1953); H.R. 520, 83d Cong., 1st Sess. (1953).

Although these bills met with little success, it is significant and striking that each was intended to amend the existing federal liquor laws for the avowed purpose of eliminating the discrimination against Indians that resulted from the application of such laws. *See, e.g.*, H.R. 4941, *supra* at 1 (Title); H.R. 6238, *supra* at 1 (Title); H.R. 6703, *supra*, §§1-3 and

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[2] This and other House Subcommittee and Committee Hearings held on H.R. 1055 are reproduced in the Appendix to the Petitioner's Brief.

Title; H.R. 6879, *supra*, §§1-3 and Title; S. 485, *supra*, §§1-3 and Title; S. 1080, *supra* at 1 (Title). It is evident from these bills that the express, and probably sole, motivation for seeking to change the liquor laws was to eliminate the perceived discrimination against Indians. The pertinent remarks in the Congressional Record regarding these bills offer confirmation of this assessment. *See, e.g.*, 95 Cong. Rec. A5489 (1949) (extension of remarks of Rep. D'Ewart); 99 Cong. Rec. A1388-A1389 (submissions of Sen. Magnuson), A1978-A1979 (extension of remarks of Sen. Goldwater) (1953). It is of particular significance that there was no reference to state or tribal jurisdiction with regard to those liquor transactions which were to be affected by the proposed legislation.

The legislative history of the bill which finally became law (H.R. 1055) follows much the same pattern. From introduction to amendment to enactment, this bill was consistently labelled as a bill to eliminate certain discrimination against Indians resulting from federal laws. *See, e.g.*, 99 Cong. Rec. 9959 (1953). The Congressional Committee Reports, the Subcommittee Hearings, and the remarks and submissions contained in the Congressional Record all also constantly emphasized the need to eliminate the discriminatory effects of the federal laws on Indians. H.R. Rep. No. 775, *supra* at 2-3; S. Rep. No. 722, *supra* at 3; 99 Cong. Rec. 10800-02 (submissions of Sen. Goldwater), 10928 (remarks of Rep. Miller), A2782-A2783 (extension of remarks of Rep. Patten) (1953); Hearings on H.R. 1055, *supra*, Pet. Br. at App. A. As the House Committee Report emphatically stated:

> It is the hope of the Committee . . . that all legislation discriminating against our Indian citizens may be abolished. Termination of the subjection of Indians to Federal laws applicable only to Indians certainly appears to be desirable . . . .
>
> * * *

> The Indians for many years have complained that the liquor laws are most discriminatory in nature. . . . Inasmuch as Indians are expected to assume the responsibilities of citizenship and serve in the Armed forces on an equal basis with other Americans, the committee sees no reason for continuing legislation that is applicable only to Indians.

H.R. Rep. No. 775, *supra* at 2. *Accord* S. Rep. No. 722, *supra* at 2.

Thus, H.R. 1055 was the culmination of the earlier proposed legislation concerning this subject. As with the earlier proposals, the prime motivation underlying H.R. 1055 was the elimination of discriminatory treatment of Indians with regard to liquor transactions. Furthermore, as with the earlier proposals, the history of H.R. 1055 contains no explicit reference to state or tribal jurisdiction over liquor transactions once federal prohibitions were removed.

The language ultimately employed by Congress confirms that it was concerned primarily with the discriminatory aspects of the pre-1953 federal liquor laws applicable to Indians.[3] It is specifically provided in 18 U.S.C. §1161 that the various federal prohibitions regarding the possession and sale of liquor in Indian country shall not apply when

> the act or transaction is in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area . . . .

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[3] Legislation intended to remedy this problem in other contexts was also enacted into law by the Eighty-Third Congress. *See, e.g.*, Public Law 83-281; H.R. Rep. No. 268, 83d Cong., 1st Sess. at 2 (1953); S. Rep. No. 793, 83d Cong., 1st Sess. at 2-4 (1953).

By enacting this provision, Congress incorporated the applicable state and tribal law into federal law. As a result, where the act or transaction is in conformity with state and tribal law, it becomes lawful under the federal statute. *See also* S. Rep. No. 722, *supra* at 2 (letter of the Ass't Secretary of the Interior); H.R. Rep. No. 775, *supra* at 3 (letter of the Ass't. Secretary of the Interior). In short, Congress had, in the guise of §1161, left the matter of liquor regulation to State and tribal governments. *See generally, United States v. Mazurie*, 419 U.S. at 547; *Federal Indian Law, supra* at 135, 262 and 382.[4]

Contemporaneous federal administrative interpretation also was consistent with the foregoing analysis. The Department of the Interior—the federal agency primarily responsible for implementation of federal policies and laws regarding Indians (*see, e.g.*, 25 U.S.C. §2)—consistently recognized that §1161 was designed to eliminate the discriminatory aspects of the federal liquor laws. *See, e.g.*, 1954 Annual Report of the Secretary of the Interior at 244; Solicitor Memorandum M-36447, II Op. Sol.—Dept. Int. Ind. Aff.[5] 1803, at 1803-04 (November 6, 1957); *Federal Indian Law, supra* at 382. Illustrative of this recognition is the following observation regarding §1161 made in a 1957 memorandum of the Deputy Solicitor to the

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[4] The supreme court has recognized in a fairly explicit manner the opening of the field to state and tribal regulation. In *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962), the court stated with regard to §1161:

> Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. [Citation omitted.] Thus, Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall.

[5] This citation refers to the two-volume publication of the Department of the Interior entitled "Opinions of the Solicitor for the Department of the Interior relating to Indian Affairs."

Commissioner of Indian Affairs: "As its title clearly states it was designed to eliminate discriminatory legislation against the Indians. . . ." II Op. Sol., *supra* at 1803-04.

B. The Errors of the Court of Appeals.

It should be evident from the preceding discussion that the Ninth Circuit incorrectly interpreted the scope and intent of §1161 in two major respects. First, there is no basis for that court's conclusion that §1161 incorporated only the "substantive standards" of state law while incorporating all aspects of tribal law, substantive or otherwise. 678 F.2d at 1344-45. This reading is plainly at odds with the language and history of §1161. As pointed out earlier, the statute provides simply that the federal prohibitions against the sale and possession of liquor in Indian country will not apply where the act or transaction is "in conformity both with" state law and tribal ordinance. The express language of §1161 requires that both state and tribal laws are to be incorporated equally. Nowhere in the legislative history is there even the slightest hint that one law was to be more or less applicable than the other.

Contemporaneous federal administrative interpretation again supports the conclusion that both state and tribal laws are to be treated equally. *See, e.g.*, Solicitor Memorandum M-36241, II Sol. Op.—Dept. Int. Ind. Aff. 1648, at 1649 (September 22, 1954); *Federal Indian Law*, *supra* at 382-83. As the Acting Solicitor succinctly stated in 1954 regarding the applicability of state and tribal law under §1161, "[t]he scope of neither appears to be limited by the Act." II. Op. Sol., *supra* at 1649. The wording of the statute and the interpretation of it by federal agencies demonstrate that, in enacting §1161, Congress intended to incorporate state and

tribal law to the same extent. That means that either (1) the substantive provisions *only* of both state and tribal law were adopted by §1161, or (2) *all* requirements and prohibitions of the state and tribal liquor laws were so adopted. The Amici believe the most supportable conclusion is that Congress referred to *all* requirements of state and tribal laws.[8] *See Berry v. Arapahoe and Shoshone Tribes*, 420 F. Supp. 934, 940 (D. Wyo. 1976).

The second error of the court of appeals is its conclusion that §1161 vests the Tribe with "exclusive jurisdiction to license and distribute liquor on the reservation", thereby ousting State jurisdiction. 678 F.2d at 1342. That conclusion is overbroad, particularly to the extent it applies to non-Indians, and finds no support in the statute or its legislative history. As was shown in this brief's earlier discussion of the scope and intent of 18 U.S.C. §1161, the primary concern of Congress in enacting the provision was with the discriminatory aspects of the federal liquor laws. Section 1161 is merely

[8] There is no indication anywhere in the legislative history that Congress intended that only the substantive provisions of the applicable state and tribal laws were to be incorporated. Indeed, because the reference to state and tribal laws is without limitation, it would appear that Congress intended to require compliance with all requirements and prohibitions of state and tribal law, substantive or otherwise. *See* Hearings on H.R. 1055 held before the House Committee on Interior and Insular Affairs (June 2, 1953) Pet. Br., App. C at a-68 - a-69 (statement of Rep. Patten, sponsor of H.R. 1055). The contemporaneous administrative treatment of §1161 suggests that as well. *See, e.g.*, Solicitor Memorandum M-36241, II Op. Sol., *supra*, 1649-50 (suggests "terms" and "conditions" of both state and tribal law applicable); *Federal Indian Law*, *supra* at 382-83 (suggests licensing requirements of state law applicable). Thus, what Congress most likely intended is that for an act or transaction to be lawful under federal law, it must be lawful under state and tribal law, which would, in turn, require conformity with all aspects of those laws.

the means by which Congress chose to remedy this problem. *See also* Solicitor Opinion M-36447, II, Op. Sol., *supra* at 1803-04. In no way was the statute a grant of jurisdiction to either the state or the tribe; nor was it a withdrawal of state or tribal jurisdiction. As the legislative history amply shows, Congress simply was not concerned with state or tribal jurisdiction over the sale and possession of liquor in Indian country; instead it was concerned with discriminatory treatment of Indians by virtue of its own prohibitory legislation. Indeed, in view of the fact that §1161 was a component of the then prevailing federal policy of terminating federal responsibility over Indians (*compare Federal Indian Law, supra* at 262 *with Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962), it is unlikely that Congress would have granted exclusive tribal jurisdiction over the possession and sale of liquor in Indian country without explicitly saying so.

How then should the question of state and tribal jurisdiction over the sale and possession of liquor on-reservation be resolved? Prior to the enactment of §1161, virtually all sale and possession of liquor within Indian country was banned under federal law. *See, e.g.*, 18 U.S.C. §§1154, 1156; *Federal Indian Law, supra* at 380, 381-82. The practical effect of this ban was that no room was left for state or tribal regulation.[7] With enactment of §1161, however, this blanket prohibition was lifted, opening the way for concurrent state and tribal

[7] From time to time, however, some states prior to 1953 supplemented the federal prohibitions by enacting concurrent state prohibitions against the sale of liquor. For example, the State of Utah enacted a law in the early 1900's prohibiting the sale of liquor to anyone within ten miles of an Indian reservation. *See, e.g.*, Public Documents—State of Utah Part I, Section 5 at 94-95 (1905-06) (Opinion No. 66 of the Attorney General, dated March 24, 1906).

regulation. Contrary to the conclusion of the court of appeals (678 F.2d at 1343), there is simply nothing in the act itself or the underlying legislative history which suggests an intent on the part of Congress to exclusively control the sale and possession of liquor in Indian country. In fact, because §1161 also repealed the enforcement provisions of the federal liquor laws (18 U.S.C. §§3113, 3488, and 3618), it is unlikely that Congress intended to pre-empt the field.

Since §1161 is neither an exclusive grant of jurisdiction to tribes nor is pre-emptive, the generally established principles regarding the division of governmental authority within reservation boundaries should govern questions of state and tribal regulation of liquor transactions.[8] Thus, whether the *state* has jurisdiction over possession and sale of liquor by *non-Indians* will depend essentially on whether the exercise of authority is pre-empted by some other federal law or whether it interferes with tribal self-government. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973). *See also Washington v. Confederated Tribes of*

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[8] So too may the "presumption in favor of the validity of the state regulation in this area that the Twenty-First Amendment requires . . . ." (*California v. LaRue*, 409 U.S. 109, 118-19 (1972) play a role here since it has long been established that "[Indian] Reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards . . . ." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). *See generally, United States v. State Tax Comm'n. of the State of Mississippi*, 421 U.S. 599, 613-14 (1975); *United States v. State Tax Comm'n. of Mississippi*, 412 U.S. 363, 373-77 (1973).

the Colville Indian Reservation, 447 U.S. 134, 154-159 (1980).[9] Whether the *state* has jurisdiction over the possession and sale of liquor by *Indians* will likely focus on the applicability and scope of particular federal statutes such as Public Law 83-280 and similar legislation.[10] Whether the *Tribe* has jurisdiction over *non-Indians* will largely depend on the examination of a number of factors not considered by the lower court. *See, e.g., Merrion v. Jicarilla Apache Tribe*, —— U.S. ——, 101 S.Ct. 894, 901-05 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

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[9] Some courts have already answered these questions by acknowledging that non-Indian liquor sellers located in Indian country must have state licenses in conformity with state law in addition to any required tribal license. *United States v. Morgan*, 614 F.2d 166, 171 (8th Cir. 1980); *Berry v. Arapahoe and Shoshone Tribes*, 420 F. Supp. 934, 940 (D. Wyo. 1976). Furthermore, the existence of a state license for non-Indians was a factor in *United States v. Mazurie*, 419 U.S. 544, 548 (1975) and no questions were raised there about the applicability of state license requirements.

[10] The court of appeals summarily concluded that Public Law 280 is inapplicable here on the basis that California's licensing scheme is "regulatory." 678 F.2d at 1350. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). Although the Amici strongly disagree with this conclusion, this issue was not presented by the Petition and therefore is not before the court.

CONCLUSION

In conclusion, the court of appeals made two significant mistakes in this case. It erroneously decided that §1161 did not encompass *all* aspects of state as well as tribal law. It also incorrectly and unnecessarily concluded that §1161 gave tribes exclusive governmental authority in Indian country and ousted all state jurisdiction. In making its ruling the court moreover failed to examine the issues and factors which are critical to a determination of how much jurisdiction a state or tribe may exercise over liquor transactions. These mistakes require reversal.

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Respectfully submitted,

MARK V. MEIERHENRY
Attorney General
State of South Dakota
ROBERT L. TIMM
Chief Deputy
Attorney General
State Capitol Bldg.
Pierre, South Dakota 57501
Tel: (605) 773-3215
Counsel for
State of South Dakota
HAROLD F. X. PURNELL
General Counsel
Florida Department of
Business Regulation
Division of Alcoholic
Beverages and Tobacco
Tallahassee, Florida 32301
Tel: (904) 488-7365

WARREN SPANNAUS
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Counsel of Record
Special Assistant
Attorney General
Third Floor, Centennial
Bldg.
Saint Paul, MN 55155
Tel: (612) 296-3294
Counsel for
State of Minnesota
DAVID ALBERT MUSTONE
TOM D. TOBIN
TOBIN LAW OFFICES
Suite 1113
1875 Connecticut Ave.,
N.W.
Washington, D. C. 20009
Tel: (202) 467-5712
Counsel for
Mahnomen County